

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2090

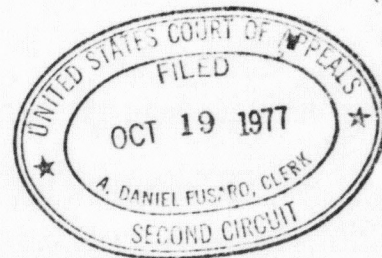
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MARCERA, and JOHN DILLMAN,
Individually and on behalf of all
others similarly situated,

Plaintiffs-Appellants,

-vs-

STEPHEN CHINLUND, JOSEPH WASSER, and
DOROTHY WADSWORTH, Individually and
in their official capacities as
members of the New York State
Commission of Correction, and
WILLIAM LOMBARD, Individually and
in his official capacity as Sheriff
of Monroe County and on behalf of
all other persons similarly situated,



Defendants-Appellees.

DEFENDANT-APPELLEE'S BRIEF
ON BEHALF OF WILLIAM LOMBARD

WILLIAM J. STEVENS
Attorney for Defendant-Appellee
William Lombard
JOHN D. DOYLE, of Counsel
Office and Post Office Address
307 County Office Building
Rochester, New York 14614
Telephone: (716) 428-5280

LOUIS J. LEFKOWITZ, ESQ.
Attorney General State of New York
PAUL O. HARRISON, of Counsel
65 Broad Street
Rochester, New York 14614
Telephone: (716) 454-4540

MONROE COUNTY LEGAL ASSISTANCE CORP.
Attorneys for Plaintiffs-Appellants
DAVID W. BEIER, III, of Counsel
DAAN BRAVEMAN, of Counsel
80 West Main Street
Rochester, New York 14614
Telephone: (716) 325-2520

TABLE OF CONTENTS

	<u>Page</u>
Questions	1
Introduction.	2
Point I	
This Appeal Should Be Dismissed for Mootness	5
Point II	
The Appeal Should Be Dismissed Based Upon the Abstention Doctrine.	7
Point III	
The Denial of Certification of the Defendant Class Is Not an Appealable Order.	10
Point IV	
Plaintiffs Were Not Entitled to a Preliminary Injunction in the Court Below and the Appellate Review Is Limited to an Abuse of Discretion by District Court.	16
Conclusion.	25
Citations	i.
Statutes and Authorities.	iii.

CITATIONS

	<u>Page</u>
<i>Allen v. Mississippi Commission of Law Enforcement</i> , 424 F. 2d 285 at p. 290 (4th Cir. 1970)	19
<i>Church v. Hegstrom</i> , 416 F. 2d 449 (2nd Cir. 1969) at p. 450.	21
<i>Collins v. Schoonfield</i> , 344 F. Supp. 257 Maryland (1973) at p. 279	22
<i>Corica v. Ragen</i> , 140 F. 2d 406 (7th Cir. 1944)	17
<i>DeSimone v. Linford</i> , 494 F. 2d 1187 (5th Cir. 1974).	5
<i>Detainees of Brooklyn House of Detention v. Malcolm</i> , 590 F 2d 392 at 399 (2nd Cir. 1975)	18
<i>Eisen v. Carlisle & Jacquelin</i> , 370 F. 2d 119, (2nd Cir. 1966) Cert. denied 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed. 2d 598 (1967).	10
<i>Exhibitors Screen Service Corporation</i> , 441 F. 2d 560 (5th Cir. 1971)	19
<i>Ex Parte National Enameling & Stamping Co.</i> , 201 U.S. 157, 26 S.Ct. 404, 50 L.Ed. 707 (1906)	19
<i>Hurwitz v. Directors Guild of America, Inc.</i> , 364 F. 2d 67 (2nd Cir. 1966).	19
<i>Inmates of Suffolk County Jail v. Eisenstadt</i> , cited in 507 F. 2d at 337	21
<i>Jelfo v. Hickok Manufacturing Company Inc.</i> , 531 F. 2d 660 at 681 (2nd Cir. 1976).	10
<i>Jones v. Diamond</i> , 519 F. 2d 1090 (5th Cir. 1975)	11
<i>Katz v. Carte Blanche Corp.</i> , 496 F. 2d 747 (3rd Cir.) (en banc) Cert. denied 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed. 125 (1974)	14
<i>W. A. Mack Corp. v. General Motors Corp.</i> , 260 F. 2d 886 (C.A. 7th 1958)	16
<i>McCray v. Sullivan</i> , 509 F. 2d 1332 at p. 1334 (5th Cir. 1975).	22
<i>McNulty v. Chinlund</i> , 89 Misc. 2d 713 (1977).	8, 9
<i>Mercury Motor Express v. Brinke</i> , 475 F. 2d 1086 (5th Cir, 1973).	19

	<u>Page</u>
<i>Miami Beach Federal Savings & Loan Association v. Callander</i> , 256 F. 2d 410 (C.A. 5th 1958)	16
<i>National Lawyers Guild, University of Texas Chapter v. Board of Regents</i> , 490 F. 2d 97 (5th Cir. 1974)	5
<i>Padgett v. Stein</i> , 406 F. Supp. 287, 293 M.D. Pa. (1975)	22
<i>Paramount Pictures Corp. v. Holden</i> , 166 F. Supp. 684 (S.D. Calif. 1958)	17
<i>Qxendine v. Williams</i> , 509 F. 2d 1405 (4th Cir. 1975)	21
<i>Railroad Commission of Texas v. Pullman Co.</i> , 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)	8
<i>Rashio v. Sinclair</i> , 486 F. 2d 1029 (9th Cir. 1973)	12
<i>Remington Research Inc. v. Modern Aids, Inc.</i> , 170 F. Supp. 7 (S.D. N.Y. 1959)	16
<i>Rhem v. Malcolm</i> , 371 F. Supp. 594 at pp. 636, 622, 623-724, n.5; 507 F. 2d 333 (2nd Cir. 1975) at pp. 335, 336, 337, 338	20, 21, 23
<i>Robinson v. California</i> , 370 U.S. 660, 676, 82 S.Ct. 1417, 8 L.Ed. 2d 758	21
<i>Rochine v. California</i> , 342 U.S. 165, 178 S.Ct. 205, 96 L.Ed. 183	21
<i>Rodgers v. United States Steel Corp.</i> , 541 F. 2d 365 (1976)	11
<i>Royal v. Clark</i> , 447 F. 2d 501 (5th Cir. 1971)	21
<i>Shayne v. Madison Square Garden Corp.</i> , 491 F. 2d 937 (2nd Cir. 1974)	10
<i>Shields v. Barrow</i> , 17 HOW 130, 15 L.Ed. 158 (1854)	17
<i>Texas v. I. .C.</i> , 258 U.S. 158, 42 S.Ct. 261, 66 L.Ed. 531 (1921)	18
<i>Time, Inc. v. Ragano</i> , 427 F. 2d 219 (1970)	19
<i>United States v. Edwards</i> , 333 F. 2d 575 (5th Cir. 1964)	19
<i>Yakus v. United States</i> , 321 U.S. 414, 88 S.Ct. 660, 88 L.Ed. 834	16

STATUTES AND AUTHORITIES

	<u>Page</u>
<i>County Law of the State of New York</i>	
Section 217	3
<i>Federal Rules of Civil Procedure</i>	
Rule 23 (a) (1) (2) (3) (4),	
(b) (2) (3)	4, 11, 12, 14, 15, 22, 23
<i>New York Compilation of Rules and Regulations</i>	
Title 9	7, 8
<i>New York State Constitution</i>	
Article XIII, Section 13.	2
<i>New York State Correction Law</i>	
Section 500 c	3, 5
<i>28 USC</i>	
Sec. 1291 (a) (1)	
Sec. 1292 (a) (1)	10, 18

QUESTIONS

1. Whether the Court lacks jurisdiction to review this matter due to mootness?
2. Whether this Court should refrain from asserting jurisdiction over this matter based upon the doctrine of abstention?
3. Whether the Court has jurisdiction to review this matter based upon an interlocutory order denying class certification of the defendant class?
4. Whether the District Court abused its discretion by denying a preliminary injunction?
5. Whether this Court should as part of its review of the denial of preliminary injunction review the District Court's class order?

INTRODUCTION

Plaintiffs Joseph Marcera and John Dillman have commenced an action against defendant William Lombard, individually and in his official capacity as the Sheriff of Monroe County and the class he purportedly represents and against the Commissioners of the New York State Department of Correction. Plaintiffs assert in this action that defendant Lombard represents "at least 40 county sheriffs who administer county jails" in New York State (A 9)*. Also included in this action are the Monroe County Jail and the 40 other county jails providing care and custody of pretrial detainees which do not provide contact visiting and are not the subject of another lawsuit (A 9).

The defendant Sheriff in this action is a constitutional officer under the provisions of *Article XIII, Section 13, of the New York State Constitution*. The Sheriff, under such provision, is elected to office for a term of three years by the people of the County. The Sheriff, under the provisions of the *County Law of the State of New York*, has certain duties and responsibilities in carrying out his constitutional office. The Sheriff does not have the power to levy taxes nor the power to raise revenue for any of the purposes of his office, but rather relies upon the financial resources of the County government to carry out the functions of his office. The Monroe County Legislature, on behalf of the Sheriff, appropriates sufficient funds in its annual County budget to pay the costs of the Sheriff's office and any other expenses that the Sheriff may incur. The Sheriff of Monroe County and the other sheriffs in the State of New York

* Number in parentheses represents pages in the joint appendix.

under the provisions of the *New York State Correction Law, Section 500 c and County Law, Section 217*, vest in the sheriff the duty to maintain and control the County Jail and custody of the inmates therein. Funds for this function and responsibility are also provided by the County Legislature in its annual appropriation of funds.

Plaintiffs sought the District Court to certify the above mentioned action as a class action both with respect to the class of plaintiffs purportedly represented and the class that the defendant Lombard represents.

The defendant Lombard opposed the plaintiffs' motion in the District Court for certification of this action by plaintiffs that both plaintiffs and defendants are representatives of a class in a class action. This opposition was based upon the fact that each defendant sheriff sought to be included within the class has the authority and responsibility of a jail facility under the above mentioned provisions of the *New York State Correction and County Law*. It was argued in the Court below that each jail facility differs substantially in terms of its physical configuration, location in the community, staffing patterns and population, amongst other differences too numerous to set forth. The funds to maintain and operate such facilities are also individually determined by each legislative body of each county in which such sheriffs are elected. These differences and distinctions between facilities, of course, raise many different issues of fact and clearly the availability of funding to various degrees in the operation of each jail facility varies substantially based on a wide degree of factors relating to each facility.

Defendant Lombard also objected to the certification of this action both with respect to the plaintiff class in that the plaintiffs failed to comply with the prerequisites for such certification under the provisions of *Rule 23 of the Federal Rules of Civil Procedure*.

Defendant Lombard also opposed the plaintiffs' motion for preliminary injunction in this matter as requested by the plaintiffs with respect to granting pretrial detainees the right to contact visits. Defendant Lombard argued in the Court below that the plaintiffs failed to substantiate their likelihood of success on the merits of their claim, failed to show any irreparable injury with respect to the subject of contact visiting and that the issuance of such injunctive relief would seriously jeopardize the *status quo* and would in fact cause irreparable harm to the defendant in that granting the plaintiffs the temporary relief they seek in this action is tantamount to granting final relief.

Plaintiff Dillman entered the Monroe County Jail facility on September 5, 1976 and left such facility on February 28, 1977 for detention at Attica Penitentiary. Plaintiff Marcera entered the Monroe County Jail on October 5, 1976 and was released on bail on November 22, 1976 and was transferred to the Wayne County Jail on a retainer warrant and returned to the Monroe County Jail on March 4, 1977 and was sentenced to six months' confinement on March 14, 1977 and was released May 27, 1977 from such Jail. Defendant Lombard now argues that this matter is moot as a result of the departure of the two named plaintiffs.

POINT I

THIS APPEAL SHOULD BE
DISMISSED FOR MOOTNESS

The plaintiffs Joseph Marcera and John Dillman were in the custody of the defendant William Lombard in the Monroe County Jail when this action was commenced. Both of the plaintiffs were pretrial detainees and were held in the Sheriff's custody pursuant to the provisions of *Section 500 c of the New York State Correction Law (A7)*. Since the time this matter was argued before the District Court in December of 1976, both plaintiffs are no longer in the custody of the defendant Lombard, as stated in the Introduction of this brief. Hence, the issues raised by the plaintiffs are not issues that should be considered by this Court upon appeal in that the plaintiffs' requests are rendered moot by virtue of the fact they are no longer pretrial detainees. *Sohappy v. Smith*, 529 F. 2d 570 (9th Cir. 1976). The Court held in this particular case, which involved an appeal by the State of Washington from the District Court's Order denying the State's motion for preliminary injunction with respect to the question of Indian fishing rights for the year 1974, that the appeal was dismissed as moot based upon the Court's statement, "The fish run of 1974 is over." A similar result was reached in *DeSimone v. Linford*, 494 F. 2d 1187 (5th Cir. 1974) where injunctive relief was sought during the course of an administrative appeal and where the Court of Appeals dismissed the appeal for mootness inasmuch as the administrative appeal was final and the need for injunctive relief was consequently moot. [See also *National Lawyers Guild, University of Texas Chapter v. Board of Regents*, 490 F. 2d 97 (5th Cir. 1974)].

Inasmuch as the lower Court did not in its decision (A 97-104) grant certification of the plaintiff class, the only question presented to this Court relates to the two individually named plaintiffs and no argument can be sustained that notwithstanding the release of the two individually named plaintiffs, such persons represent a class of persons for purposes of this appeal in that the class has not been certified by the lower Court.

POINT II

THE APPEAL SHOULD BE DISMISSED
BASED UPON THE ABSTENTION DOCTRINE

The plaintiffs seek to compel the defendants Chinlund, Wasser and Wadsworth in their official capacities from

(a) continuing to deny the plaintiffs and other pre-trial detainees their right to receive contact visits while confined in county jails in New York State;

(b) from refusing to insure the initiation and continued operation of contact visitation programs for plaintiffs and other pretrial detainees in county jails in New York State; and

(c) requiring such defendants to develop a plan which will insure the initiation and continued operation of contact visitation programs for plaintiffs and other pretrial detainees in county jails in New York State. (A 17)

The defendants submitted to the lower Court certain official directives promulgated by the defendant Commissioners which concerned safety, security and good order (A 19-20) and a letter re-affirming the requirement with respect to contact visitation (A 23-24). Subsequent to the letter set forth with respect to the provisions of contact visitation, an action was commenced in New York State Supreme Court by an Order to Show Cause signed by the Honorable John H. Pennock, a Justice of the Supreme Court in Albany, New York, on November 19, 1976 which enjoined the defendants Chinlund, Wadsworth and Wasser, also named as defendants in the State Court action, from enforcing the administrative code provisions set forth in *Title 9 of*

the New York Compilation of Rules and Regulations pending a hearing (A 56-73). The Supreme Court rendered a decision in this matter on January 26, 1977. *McNulty v. Chinlund*, 89 Mis. 2d 713 (1977). A copy of said Opinion is appended to this brief for the convenience of the Court. The Supreme Court continued the injunction granted to the plaintiff in effect with respect to the various regulations promulgated by the defendants in their capacity as the New York State Commission of Correction. This decision specifically precludes defendants Chinlund, Wasser and Wadsworth from implementing the regulations referred to by the plaintiffs in this action. Consequently, the ultimate authority and power of the New York State Commission of Correction is the subject of a State Court action involving a State agency. While such State Court proceeding proceeds through the appellate process of New York State, this Court under the doctrine of abstention should exercise its discretion to stay any further consideration of the appeal of this matter pending the interpretation of the challenged rules and regulations promulgated by the Commission of Correction. Such exercise of discretion may obviate the necessity for a decision of a Federal constitutional question. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). Assuming *arguendo* that this Court were to reverse the lower Court with respect to the implementation of contact visiting, the Commission of Correction would be under an affirmative duty to supervise such implementation based upon its promulgated regulations while at the same time would be violating the provisions of a Court Order restraining such implementation. Defendant Lombard and other county sheriffs would be in a similarly distressful situation of undertaking to implement such contact visitation without the benefit and

advice of the State Commission of Correction. This result would be, at a minimum, confusing and would require the District Court to supervise the implementation of some 40 plans while a unified State scheme for such implementation was being litigated in the State Courts. Clearly, the action in the State Court can eliminate the constitutional question of contact visiting in addition to other rights that persons incarcerated in county jails would have under the Commission of Correction Rules and Regulations.

Further, the questions raised by the plaintiffs in the State Court action raise new questions of law in New York with regard to constitutional officers of the State being required to adhere to regulations promulgated by an administrative body. There is certainly within the authority vested in the Courts of New York adequate remedies for the adjudication of the questions presented in the *McNulty* case. There can be no clearer set of facts than those presented in this appeal and in the *McNulty* case for the invocation of the abstention doctrine. This issue was raised as an affirmative defense by the County of Monroe in its answer to the plaintiffs' complaint. (A 75)

POINT III

THE DENIAL OF CERTIFICATION
OF THE DEFENDANT CLASS IS NOT
AN APPEALABLE ORDER

The plaintiffs argue that the District Court's denial of class certification of the defendant class is an appealable order based upon an exception to the general rule that such an order is not a "final order" under 28 USC Sec. 1291 (a) (1). The plaintiffs also argue that the District Court has narrowed the scope of relief available to plaintiffs to the Monroe County Jail and that, of course, in effect, the plaintiff class has also been narrowed. Under the rationale used by the plaintiffs any denial of class certification would be appealable. This Court has never viewed the exception upon which plaintiffs rely as swallowing the general rule. On the contrary, this Court has stated,

"Under our 'death knell' doctrine the order would be appealable only if we conclude that the suit would end if class action status were denied."

Jelfo v. Hickok Manufacturing Company Inc.,
531 F. 2d 660 at 681 (2nd Cir. 1976) citing
Shayne v. Madison Square Garden Corp.,
491 F. 2d 937 (2nd Cir. 1974); *Eisen v.*
Carlisle & Jacquelin, 370 F. 2d 119 (2nd Cir.
1966) cert. denied 386 U.S. 1035, 87 S.Ct.
1487, 18 L.Ed. 2d 598 (1967).

The Court in *Jelfo* also clearly stated,

"The burden to show appealability rests upon plaintiffs, who ask us to assume jurisdiction."

The plaintiffs in this action still have the right to proceed in their action against defendant Lombard and the Monroe County Jail. The exceptions to the general rule, i.e.,

"An order denying class action that simply strikes the class allegations and permits the individual case is not appealable", *Jones v. Diamond*, 519 F. 2d 1090 (5th Cir. 1975),

must relate to the heart of the relief sought by the plaintiff with respect to injunctive relief.

"The desired injunction must be capable of resolving the substantive issues of the claim and secondly the Court must look to the bottom line to see if the plaintiff was effectively denied access to the Courts." (*Jones at pp. 1096-1097*)

Certainly the denial of the class certification of the defendant class and the failure of the lower Court to grant injunctive relief does not effect the heart of the plaintiffs' claim nor deny them access to proceed against defendant Lombard in the District Court. The rights of the plaintiffs will not be irreparably damaged while such action proceeds, which final judgment, of course, will be subject to appellate review. *Rodgers v. United States Steel Corp.*, 541 F. 2d 365 (1976).

* The defendant Lombard argued in the Court below with respect to the plaintiffs' assertions that they complied with the requirements of Rule 23 of the Federal Rules of Civil Procedure that the plaintiffs in fact failed to show and demonstrate such compliance with the requirements of Rule 23. Rule 23 (a) states the following requirements are prerequisites to a class action and one or more members of a class may sue or be sued as representative parties only if

"(1) class is so numerous that joinder of all members is impracticable."

The plaintiffs alleged that there are at least fifteen hundred pretrial detainees who are being denied a right to contact visits (A 8) by a defendant

class who refuse to provide contact visiting (see p. 23 of plaintiffs' brief). The plaintiffs submitted no proof with respect to such refusal of "at least forty (40) sheriffs" nor any proof with respect to the number of detainees who would constitute the class, but rather allege that there are over forty jails that potentially house such detainees (A 9). The plaintiffs simply asked the District Court to rely on an unsupported statement of fact (A 35) that established which facilities have instituted contact visits. Such letter only identifies the total number of prisoners and discusses daily population but clearly fails to distinguish between pretrial detainees and sentenced prisoners. Consequently, there was a substantial question of fact concerning the validity of the allegation that there are fifteen hundred pretrial detainees similarly situated to the plaintiffs. It is not sufficient to rely upon unsubstantiated bare allegations in pleadings as the plaintiffs requested the lower Court to do with respect to class certification. Where the District Court fails to rule on certifying an action for class action status, the Appellate Court should not interfere. *Rashio v. Sinclair*, 486 F. 2d 1029 (9th Cir. 1973).

Rule 23 further provides that

"(2) there are questions of law or fact
common to the class."

As stated in the introduction to this brief, the plaintiffs alleged below that there are forty institutions within the State operated by forty different sheriffs and yet they requested the lower Court to conclude that the questions of law and fact with respect to each of these facilities is common. Nothing could be farther from the truth in that, as defendant Lombard argued in the Court below, each facility is unique in terms of its physical characteristics, its physical location in the community, the

degree of security for each institution, its staffing patterns, the demands on the facility based on the population of the facility varies widely and most importantly, and clearly overlooked by the plaintiffs, is the degree and method of funding available for each facility to not only operate but to undertake capital improvements (A 47).

The Monroe County Jail operated by defendant Lombard is a facility of fairly recent vintage having been constructed in the late 1960s as a maximum security institution. This facility is located in the central portion of the City of Rochester and is in fact located amidst several government offices. Certainly the facts surrounding this facility, which has an average daily population of 300 to 350 persons, differs substantially from a rural county institution which is not located within any major population area. The Monroe County Jail is the depository for all persons arraigned and who have been apprehended by over eleven (11) separate police agencies within Monroe County alone. The security problems associated with this facility and the cost of operating this facility differ substantially from those of a rural jail. For the plaintiffs to argue as they did in the lower Court that there are common facts with respect to the defendant class is without merit and to argue that a common issue should predominate over factual disparities is to ask this Court to indulge in myopic reasoning. Defendants also wish to refute the argument raised by the plaintiffs that there is a common issue of law to all members of the class. The cases cited by plaintiffs relate to security institutions located within the Greater New York City area. In each of these cases the Court was required to examine the state of facts surrounding each institution and based upon those facts, the Court reached its conclusions. In this particular action, the question

of a common issue of law to all members of the plaintiff class or defendant class could not simply be presumed by the lower Court as the plaintiffs requested. It has been said that a District Court's decision to grant or deny such a motion may be reversed only for an abuse of discretion. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3rd Cir.) (en banc) Cert. denied 419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974). The District Court certainly had sufficient grounds to deny defendant class certification based upon the plaintiffs' failure to show full compliance with the requirements of subdivision (2) of Rule 23.(a).

It is also apparent that plaintiffs recognized such failure and sought to rectify such error by the submission to the lower Court of an additional affidavit by a purported "expert" in the field of corrections (A 107) in support of plaintiffs' motion under Rule 59 (e). As stated in the affidavit of opposition to such motion (A 123-126), the affiant had never visited any jail facilities above Dutchess County in New York State and by his own admission, had never visited the Monroe County Jail (A 124). Defendant Lombard viewed this motion as an attempt by plaintiffs to argue their motion *de novo*, a practice not authorized under Rule 59 (e).

Rule 23 further provides that

"(3) claims or defenses of the representative parties are typical of the claims or defenses of the class."

As stated previously, the defendant Lombard and the institution for which he is responsible differ substantially from other jails and institutions in this State and therefore defendant Lombard is certainly not representative of the defenses that may be raised by all sheriffs the plaintiffs allege

are similarly situated in this State. Each institution has its own individual problems concerning contact visits and each set of problems differs widely with each institution. More importantly, each institution and its operation is limited by the amount of funds available. Certainly even the plaintiffs cannot argue that the funding levels for each institution are similar and yet it is this funding level that substantially determines the *modus operandi* of each jail facility. Without the necessary funds, capital construction may be severely hampered and staffing may be below level. (A 47) In Monroe County defendant Lombard is confined to the appropriations established for the Jail by the Monroe County Legislature. (A 46) Based on these facts alone, the lower Court determined that defendant Lombard is not representative of the defendant class in this action. (A 101)

Rule 23 (4) states that

"(4) the representative parties will fairly and adequately protect the interests of the class."

In this action defendant Lombard does not necessarily represent an interest which would provide a vigorous defense of institutions which are substantially different from the Monroe County Jail in terms of its physical characteristics and substantially different in terms of its funding priorities from the governing body of each county. A poorer quality institution funded by a low priority in a county budget certainly would not be representative of the type of facility under defendant Lombard's control.

The issues with respect to the failure of the plaintiffs to meet the requirements of Rule 23 (b) (2) and (3) are discussed in Point IV *infra*.

POINT IV

PLAINTIFFS WERE NOT ENTITLED TO A
PRELIMINARY INJUNCTION IN THE COURT
BELOW AND THE APPELLATE REVIEW IS
LIMITED TO AN ABUSE OF DISCRETION
BY DISTRICT COURT

The plaintiffs sought the lower Court to grant a preliminary injunction which would enjoin defendant Lombard and those he purportedly represents "from continuing to deny pretrial detainees their right to contact visits." (A 17) To be entitled to such relief the plaintiffs must show that there is probability of success on the merits, the showing of irreparable harm if not granted and the balance of the equities are in their favor. *Remington Research Inc. v. Modern Aids, Inc.*, 170 F. Supp. 7 (S.D. N.Y. 1959). An examination of the relief that the plaintiffs sought was actually asking the lower Court to grant is not a prohibitory injunction, but rather a mandatory writ which compels the defendants in order to obey it to take affirmative action at a considerable expense. (A 102) Such an injunctive power should be sparingly exercised due to the harm that could result to defendants. *Miami Beach Federal Savings & Loan Association v. Callander*, 256 F. 2d 410 (C.A. 5th 1958). It has been held that no interlocutory injunction is construed as a matter of right regardless of whether irreparable injury may result to the plaintiff. *Yakus v. United States*, 321 U.S. 414, 88 S. 60, 88 L. Ed. 834. The danger that the lower Court recognized with respect to injunctive relief being granted in this matter is that such relief would not be maintaining the *status quo* pending final determination of the suit which is clearly the main purpose of such relief. *W. A. Mack Corp. v. General Motors Corp.* 260 F. 2d 886 (C.A. 7th 1958).

Rather it would have permitted the plaintiffs a clear and undue advantage in that such "temporary" relief would have given plaintiffs essentially all the actual advantage that could be obtained from a final adjudication. *Corica v. Ragen*, 140 F. 2d 406 (7th Cir. 1944); *Paramount Pictures Corp. v. Holden*, 166 F. Supp. 684 (S.D. Calif. 1958). This would be unfair to defendant Lombard and would essentially foreclose any further examination of plaintiffs' demands before this Court. The cost of such action was an estimated expense of \$750,000.00, according to defendant Lombard's affidavit. (A 46)

A particularly crucial factor in the plaintiffs' demand for relief that was considered by the lower Court with respect to the plaintiffs' probability of success on the merits in this action related to a necessary and indispensable party. (A 103) The plaintiffs only named the defendant Lombard and the three Commissioners of Correction. Plaintiffs did not name any members of the governing body of the County and yet as stated by defendant Lombard, he is unable to levy taxes and raise revenue to pay for any of his duties, rather, that power is vested in the Monroe County Legislature and the governing body of every county in which there is a jail facility under a sheriff which falls within the purported class of defendants that Lombard represents. This is fatal to the plaintiffs' probability of success in that the governing body of the county must be considered a necessary and indispensable party. The County Legislature has a definite interest in the controversy and such interest is so inseparable from that of the defendant Lombard that a final determination cannot be made

"without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience . . . "
Shields v. Harrow, 17 HOW 130, 15 L.Ed. 158 (1854)

Certainly the governing body of a county required to appropriate three quarters of a million dollars is an indispensable party in that a final judgment would be of "immediate concern" to it. *Texas v. I.C.C.*, 258 U.S. 158, 42 S. Ct. 261, 66 L. Ed. 531 (1921).

The Courts have recognized that they cannot direct authorities to raise necessary funds but they can order the release of persons unless conditions are corrected in a reasonable time. *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F. 2d 392 at 399 (2nd Cir. 1975). Regardless of such a statement, the Court had jurisdiction of an administrative officer of the City of New York and the Mayor of such City in that action. This unlike the facts in this action in that the Sheriff, being a constitutional officer of the State of New York is not answerable to any body or person except the people. Consequently any directive or order to such officer would be a futile gesture if the governing body were to refuse to appropriate any funds that might be required. This would clearly cause a significant confrontation between a constitutional officer of the County and the legislative body of the County. The result would have been a demand upon the lower Court, if plaintiffs were granted their injunctive relief, and no funds were appropriated, for the release of detainee prisoners. This clearly is an undesirable result and so substantial a disruption of the *status quo* against the rights of the defendant Lombard that any further hearing on the merits would have been meaningless.

While it is clear that an Appellate Court has jurisdiction under 28 USC Sec. 1292 (a) (1) to review an order denying a preliminary injunction,

"A Court of Appeals normally will not consider the merits of a case before it on an interlocutory appeal except to the extent necessary to decide narrowly the matter which supplies appellate jurisdiction."

Mercury Motor Express v. Brinke, 475 F. 2d 1086 (5th Cir. 1973) at p. 1091 citing *Time, Inc. v. Ragano*, 427 F. 2d 219 (1970).

The scope of review by Appellate Courts has been limited to the abuse of discretion by the lower Court.

"It is well established that the granting or denying of a preliminary injunction is a matter addressed to the sound discretion of the District Court."

Mercury, *supra*, citing *Exhibitors Screen Service Corporation*, 441 F. 2d 560 (5th Cir. 1971)

"The only issue before us and the only issue we shall consider is whether the district judge abused his discretion in denying the preliminary injunction -- that is the universal test, and the district judge's action will not be disturbed on appeal unless there is a clear abuse of discretion."

United States v. Edwards, 333 F. 2d 575 (5th Cir. 1964)

". . . and the merits of the cause of action are reviewable only to the extent that they bear on the denial of the injunction."

Allen v. Mississippi Commission of Law Enforcement, 424 F. 2d 285 (4th Cir. 1970) at p. 290.

"As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal."

Hurwitz v. Directors Guild of America, Inc., 364 F. 2d 67 (2nd Cir. 1966) citing *Ex Parte National Enameling & Stamping Co.*, 201 U.S. 157, 26 S. Ct. 404, 50 L. Ed. 707 (1906).

The plaintiffs urge this Court to review not simply whether the lower Court abused its discretion with respect to the denial of their request for preliminary injunction but to review the entire merits of their position with respect to contact visiting. The plaintiffs, of course, rely entirely on the *Rhem* series of cases involving the various correctional institutions of New York City. These cases, defendant Lombard argued, have related to conditions existing in New York City jails that "would shock the conscience of any citizen who knew of them." *Rhem v. Malcom*, 371 F. Supp. 594, at page 636 and relied upon by this Court in the same case at 507 F. 2d 333 (2nd Cir. 1975) at p. 335. The lower Court in the *Rhem* case found after an extensive trial that

"The totality of circumstances at (the Tombs) have produced dismal conditions significantly inferior to those existing at New York State penal institutions and many municipal or federal houses of detention."

371 F. Supp. at 622, 507 F. 2d at 335.

There was a complete failure on the part of the plaintiffs to demonstrate any of the jail facilities involved in this action as a matter of law fall within the ambit of *Rhem*. Nothing submitted by the plaintiffs in the form of affidavits could approach such a standard and yet plaintiffs demanded preliminary injunctive relief that would have been tantamount to final relief. This Court specifically stated in *Rhem*

"This court has expressed considerable doubt that the clause is properly applicable to all until after conviction Accordingly, we prefer to adopt the approach taken by the district judge here that a detainee is entitled to protection from cruel and unusual punishment as a matter of due process and, where relevant, equal protection." 371 F. Supp. at 623-724 and n. 5 and 507 2d 333 at 337. (Emphasis provided)

This Court further stated that conditions in the jail are a substantial factor in the relief granted. This Court found conditions were at times worse than the Tombs, e.g., *Inmates of Suffolk County Jail v. Eisenstadt* (see 507 F. 2d at 337). This Court found

"if the concededly 'very uncomfortable' conditions for detainees are so unnecessary as to be a denial of due process or compare so unfavorably with those accorded by the State to convicted defendants elsewhere as to deny equal protection of the laws."

507 F. 2d at 338.

It is clear that conditions in the jail facilities in New York City compelled this Court to overlook the classification of pretrial detainees versus convicted defendants on the theory of equal protection.

This Court and other courts have reached a similar conclusion in other cases. This Court said in *Church v. Hegstrom*, 416 F. 2d 449 (2nd Cir. 1969) at p. 450

"Whether a complaint is deemed to allege cruel and unusual punishment violating the Eighth Amendment, it must suggest the possibility of some 'conduct that shocks the conscience' citing *Rochine v. California*, 342 U.S. 165, 178 S.Ct. 205, 96 L.Ed. 183 "or barbarous act". *Robinson v. California*, 370 U.S. 660, 676, 82 S.Ct. 1417, 8 L.Ed. 2d 758.

"Federal courts will not interfere in the administration of prisons absent an abuse of the wide discretion allowed prison officials in maintaining order and discipline."

Royal v. Clark, 447 F. 2d 501, (5th Cir. 1971).

"Qxendine has no constitutional right to physical contact with his family."

Qxendine v. Williams, 509 F. 2d 1405 (4th Cir. 1975)

"Several courts have concluded that inmates have suffered cruel and unusual punishment as the result of exposure to the *cumulative effect* of prison conditions, even though the conditions examined separately would not violate the Eighth Amendment."

Padgett v. Stein, 406 F. Supp. 287, 293 M.D. Pa. (1975)

"Visitation privileges are a matter subject to the discretion of prison officials."

McCray v. Sullivan, 509 F. 2d 1332 at p. 1334 (5th Cir. 1975).

Lack of ability to touch his mother led the Court in *Collins v. Schoonfield*, 344 F. Supp. 257 Maryland (1973) at p. 279 to state

"Yet this does not rise to the level of cruel and unusual punishment. Once again, it must be remembered that plaintiff's complaints whether they would be deemed meritorious in and of themselves by a supervisory body, executive, legislative or judicial can be considered by this court only within the context of violation of federal constitutional standards."

Consequently, in the opinion of defendant Lombard, the District Court did not abuse its discretion by denying injunctive relief in that plaintiffs are not entitled to such relief as a matter of law.

The plaintiffs argue that because this Court has jurisdiction to review a denial of preliminary relief it may also review the District Court's class order (see Point IV B p. 35 of plaintiffs' brief). Defendant Lombard opposes such a contention based upon the plaintiffs' inability to show under Rule 23 (b) (2) (3) that

- "(2) the party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . with respect to the class; or
- "(3) the court finds that the questions of . . fact common to the members of the class predominate over any questions affecting only individual members"

With respect to the provisions of (b) (2) quoted above, plaintiffs have failed to show that defendant Lombard falls into the category of failing to act on grounds generally applicable to the class. There is no showing by the plaintiffs that the defendant Lombard is required to act in any particular manner in that the facts surrounding the Monroe County Jail are such that there is a sufficient question of fact as to whether the result reached in the *Rhem* cases as discussed above applies to the Monroe County Jail. Plaintiffs simply indulge in a continuing presumption that as a matter of law the result in these cases applies to this facility. The plaintiffs failed to show in the lower Court how conditions in the Monroe County Jail were equivalent to or worse than in New York City or Suffolk County.

The plaintiffs also failed to show that the questions of fact with respect to the members of the class predominate over any questions of fact affecting the individual members. The plaintiffs made no showing whatsoever concerning the other forty institutions that are supposedly similar to defendant Lombard's facility. Their affidavits are totally devoid of any discussion on these factual questions. As a matter of fact, the facts affecting the facts affecting the individual members vary so widely and are so divergent that it would be patently unfair to conclude that there are any facts common to the members of the class prior to a full trial of this

matter and certainly for the plaintiffs to conclude that there are common facts which override the facts affecting individuals in the class is whole-sale speculation.

Consequently, the scope of review demanded by the plaintiffs should be denied with respect to the class order.

CONCLUSION

The District Court's decision should be affirmed in all respects.

Dated: October 14, 1977
Rochester, New York

Respectfully submitted,

WILLIAM J. STEVENS
Attorney for Defendant-Appellee
William Lombard
JOHN D. DOYLE, of Counsel
Office and Post Office Address
307 County Office Building
Rochester, New York 14614
Telephone: (716) 428-5280

JOHN J. McNULTY, JR., as Sheriff of Albany County, et al.,
Plaintiffs, v STEPHEN CHINLUND et al., Constituting the
New York State Commission of Correction, Defendants.

Supreme Court, Special Term, Albany County, January 26, 1977

Prisons and prisoners — State Commission of Correction — mandated contact visitation in county jails.

The State Commission of Correction, which is empowered to promulgate "rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities" (Correction Law, § 45, subd 6), had no authority to promulgate regulations requiring contact visitation in county jails (9 NYCRR Part 7008). The power to establish the time, location and conditions of visitation at the county jails has been delegated to the county Sheriffs (County Law, §§ 500-j, 500-c). Although very broad jurisdiction over local correctional facilities has been delegated to the commission, such jurisdiction does not include the regulation of visitation. The legislation conferring regulatory powers upon the commission (L 1975, ch 865) did not repeal the statutes governing the powers of the county Sheriffs by implication. Contact jail visitation is not mandated by Federal constitutional law. The wisdom of contact visitation should be determined by the Legislature or by those to whom the legislative powers legally have been delegated. Even if there is an independent constitutional right to contact visits, it would be necessary to examine the visitation regulations adopted by each of the county Sheriffs.

Peter R. Kehoe for plaintiffs. *Louis J. Lefkowitz*, Attorney-General (*Anthony J. Conde* of counsel), for defendants. *James McSparron* for New York State Commission of Correction, defendant. *David W. Beier, III*, for Monroe County Legal Assistance Corp., *amicus curiae*. *William E. Hellerstein*, *Joel Berger* and *John Boston* for Prisoners' Rights Project, *amicus curiae*.

ROGER J. MINER, J. This is an action for declaratory judgment wherein plaintiffs, the Sheriffs of the various counties described in the complaint, seek to enjoin the enforcement of certain rules and regulations adopted by defendants. Before this court is a motion by plaintiffs for a preliminary injunction and a motion by defendants to dismiss the complaint.

Legislation was enacted at the 1975 session of the New York

BEST COPY AVAILABLE

Legislature designed to restructure and expand the powers of the State Commission of Correction. (L 1975, ch 865.) In his message of approval on August 9, 1975 the Governor summarized the legislation as follows: "This bill provides for a three-man full-time Commission to oversee the operations of State and local correctional facilities, to formulate programs for the improvement of the correctional system and to create a system for the investigation and resolution of grievances in local correctional facilities." (McKinney's Session Laws of NY, 1975, p 1781.)

The Correction Law, as thus amended, empowered the commission to "[p]romulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all persons confined in correctional facilities." (Correction Law, § 45, subd 6.) Acting pursuant to this statutory authority, the commission adopted regulations, effective October 1, 1976, affecting the following matters in county jails: correspondence (9 NYCRR Part 7004); visitation (9 NYCRR Part 7008); access to media (9 NYCRR Part 7023); religion (9 NYCRR Part 7024); packages (9 NYCRR Part 7025); and printed material and publications (9 NYCRR Part 7026). The effective date of the visitation regulation was extended to November 9, 1976. Although plaintiffs seek to invalidate all these regulations, argument on these motions was limited to the validity of the regulations pertaining to visitation and packages.

The visitation regulation under attack provides for contact visits as follows: "(a) Physical contact shall be permitted between a prisoner and his visitors. (b) Prisoners and their visitors shall be required to conduct themselves in a manner consistent with reasonable standards of public decency." (9 NYCRR 7008.6.) Guidelines for the implementation of this regulation were published by defendant on August 18, 1976 and defined physical contact as "handshaking, embracing, hand holding and kissing." The guidelines further provided that prisoners be permitted to hold and play with their children and suggested means of implementing contact visitation within existing structural limitations. The package regulation and guidelines permit the introduction of a wide variety of specified items into jail facilities, subject to certain restrictions.

The New York Constitution confers no authority upon the

Sheriffs to maintain and operate county jails. (Cf. NY Const, art XIII, § 13.) It is the function of the Legislature to provide for the establishment and operation of such institutions. Exercising that function, the Legislature has directed each county to maintain a county jail or to participate in the operation of a regional facility. (County Law, § 217; Correction Law, art 4-A.) "It is doubtless true that the Legislature could abolish county jails altogether and require counties to care for their prisoners in some other institution fixed by law, with or without the consent or approval of the several counties." (*Matter of County of Cayuga v McHugh*, 4 NY2d 609, 615.)

There is no question that the Legislature therefore has authority to establish rules and regulations governing the operation of county jails. It may delegate that authority to others. (*Matter of Levine v Whalen*, 39 NY2d 510.) The authority to regulate visitation at the county jails has been delegated to the county Sheriffs.

Section 500-j of the Correction law is a long-standing enactment of the New York Legislature and expresses a legislative mandate that certain public officials have free access to jails. The section further provides as follows: "No other person not otherwise authorized by law shall be permitted to enter the rooms of a county jail * * * unless under such regulations as the sheriff of the county * * * shall prescribe." The power to establish the time, location and conditions of visitation clearly has been delegated to the county Sheriffs.

The foregoing conclusion is further supported by section 500-c of the Correction Law which provides, in part, as follows: "Each sheriff, except the sheriff of the City of New York and the sheriff of the County of Westchester, shall have custody of the county jails and shall receive and safely keep, in the county jail of his county, every person lawfully committed to his custody for safekeeping, examination or trial, or as a witness, or committed by sentence to imprisonment therein, or committed for contempt * * * All persons confined in a county jail or penitentiary shall, as far as practicable, be kept separate from each other, and shall be allowed to converse with their counsel, or religious adviser, under such reasonable regulations and restrictions as the keeper of the jail may fix. Convicts under sentence shall not be allowed to converse with any other person, except in the presence of a keeper. The keeper may prevent all other conversations by any other

prisoner in the jail when he shall deem it necessary and proper."

Although very broad jurisdiction over local correctional facilities has been delegated to the defendants, such jurisdiction does not include the regulation of visitation. The 1975 legislation conferring regulatory powers upon the defendants cannot be said to have repealed sections 500-c and 500-j by implication. "Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect." (McKinney's Cons Laws of NY, Book 1, Statutes, § 391; also, see, *Matter of Corning v Donohue*, 29 NY2d 209; *Carter v Board of Supervisors of County of Nassau*, 31 AD2d 945, revd on other grounds 25 NY2d 420.) Sections 500-c, 500-j and subdivision 6 of section 45 of the Correction Law are not in such conflict. It follows that the defendants were without authority to promulgate regulations pertaining to visitation and that 9 NYCRR Part 7008 is invalid.

The court finds no merit in defendants' argument that contact visitation is mandated by Federal constitutional law as revealed by the United States courts. The case of *Rhem v Malcolm* (371 F Supp 594, affd 507 F2d 333) involved a totality of intolerable conditions faced by pretrial detainees at the Tombs prison in New York City. The specific situation of pretrial detainees at the House of Detention for Men on Rikers Island was addressed by the United States Court of Appeals, Second Circuit, in *Rhem v Malcolm* (527 F2d 1041). The county jails for which the plaintiffs are responsible include inmates serving sentences after conviction as well as pretrial detainees. The court is aware that some United States District Courts have held that there is an independent right to contact visits. It would not seem that the question of jail visitation involves Federal constitutional law. Indeed, the increasing tendency of some Federal courts to become involved in the operation of State and local government in the name of the Constitution has become a matter of national concern. (See *Too Much Law?*, *Newsweek*, Jan. 10, 1977, p 42.) The wisdom of contact visitation should not be determined by the courts; it should be determined by the Legislature or by those to whom the legislative powers legally have been delegated. Even if it were to be assumed that there is an independent right to contact visits under the United States Constitution, it would be necessary, in light of the determination made

herein, to examine the visitation regulations adopted by each of the plaintiffs. Those regulations are not before the court and cannot be the subject of inquiry in this action.

In view of the foregoing the motion by plaintiffs for a preliminary injunction enjoining the enforcement of the visitation regulation promulgated by defendants is granted; consistent with this determination, the defendants also will be enjoined from enforcing their religion and access to media regulations to the extent that such regulations impinge upon the authority of the plaintiffs to regulate entry into county jails. It is suggested that plaintiffs move for summary judgment in order that a final determination may be made in accordance with this decision.

The remaining regulations subject of this action, insofar as they do not pertain to jail entry, have been adopted pursuant to the powers conferred upon defendants by the Legislature. Accordingly, the motion to dismiss the complaint for failure to state a cause of action as to those regulations is granted.

County of Monroe

NEW YORK

COUNTY ATTORNEY
WILLIAM J. STEVENS

FIRST DEPUTY
JOHN D. DOYLE

SECOND DEPUTY
CHARLES R. VALENZA

DEPUTIES
EUGENE P. LaBUE
JOSEPH C. PILATO

COUNSEL
NIRA KERMISCH



DEPARTMENT OF LAW
307 COUNTY OFFICE BUILDING
ROCHESTER, NEW YORK 14614

TELEPHONE
(716) 428-5280

October 14, 1977

A. Daniel Fusaro, Clerk
U.S. Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Docket No. 77-2090

Cal. No. 310

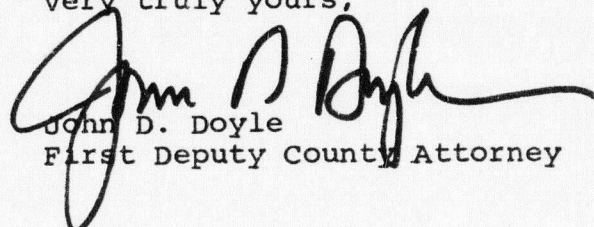
Re: Joseph Marcera, Individually and on behalf of all others
similarly situated, John Dillman vs. Stephen Chinlund,
Joseph Wasser, Dorothy Wadsworth, Individually and in
their official capacities as members of the New York State
Commission of Corrections, William Lombard, Individually
and in his official capacity as Sheriff of Monroe County
and on behalf of all other persons similarly situated

Dear Sir:

I am enclosing herewith twenty-five (25) copies of Defendant-Appellee Lombard's brief in the above captioned matter pursuant to F.R.A.P. Rule 31, 28 U.S.C.A.

I am also enclosing herewith an affidavit of personal service stating that the appropriate number of briefs were served on the attorneys for the Plaintiffs-Appellants and Defendants-Appellees in this matter on this date.

Very truly yours,


John D. Doyle
First Deputy County Attorney

JDD:dab
Encs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MARCERA, and JOHN DILLMAN, Individually
and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

STEPHEN CHINLUND, JOSEPH WASSER, and DOROTHY
WADSWORTH, Individually and in their official
capacities as members of the New York State
Commission of Correction, and WILLIAM LOMBARD,
Individually and in his official capacity as
Sheriff of Monroe County and on behalf of all
other persons similarly situated,

AFFIDAVIT OF
PERSONAL SERVICE

Defendants-Appellees.

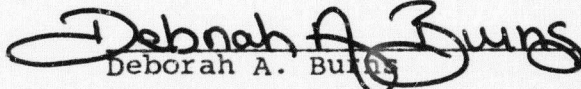
STATE OF NEW YORK)
COUNTY OF MONROE) SS.
CITY OF ROCHESTER)

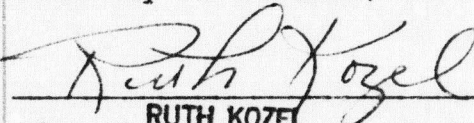
DEBORAH A. BURNS, being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18
years of age and resides at Rochester, New York.

That on the 14th day of October, 1977 deponent delivered
two (2) Briefs on behalf of Defendant-Appellee, William Lombard, on
the offices of Louis J. Lefkowitz, Attorney General State of New
York, Paul O. Harrison, of Counsel, attorney for Defendants-Appel-
lees, Chinlund, Wasser and Wadsworth, 65 Broad Street, Rochester,
New York, and Monroe County Legal Assistance Corp., attorneys for
Plaintiffs-Appellants, David W. Beier, III, of Counsel, 80 West
Main Street, Rochester, New York.

Sworn to before me this
14th day of October, 1977


Deborah A. Burns


RUTH KOZEL

Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification
By Attorney

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

☐ Individual
Verification

the
the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

being duly sworn, deposes and says: deponent is
in the within action; deponent has read
and knows the contents thereof; the same is true to

☐ Corporate
Verification

the
a
foregoing
of
corporation,
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

in the within action; deponent has read the
and knows the contents thereof; and the same
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit
Service
By Mail

On 19 deponent served the within
upon
attorney(s) for

in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box

☐ Affidavit
of Personal
Service

On 19 at
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

WILLIAM J. STEVENS

Attorney for

Office and Post Office Address
307 County Office Building
ROCHESTER, N. Y. 14614

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,

WILLIAM J. STEVENS

Attorney for

Office and Post Office Address
307 County Office Building
ROCHESTER, N. Y. 14614

To

Attorney(s) for

BEST COPY AVAILABLE

Index No.

Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MARCERA, et al.,

Plaintiffs-Appellants,

vs.

STEPHEN CHINLUND, et al.,

Defendants-Appellees.

AFFIDAVIT OF
PERSONAL SERVICE

JOHN D. DOYLE, of Counsel
WILLIAM J. STEVENS

Attorney for William Lombard

Office and Post Office Address, Telephone

307 County Office Building

ROCHESTER, N. Y. 14614

PHONE 428-5200

To

Attorney(s) for

Service of a copy of the within

Dated,

is hereby admitted.

Attorney(s) for